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Supreme Court, U.S.
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No. 05-111

In The

Supreme Court of the United States

JOSEPH LEONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

The jurisdictional element of the Hobbs Act, 18 U.S.C. § 1951(a), requires proof that the defendant's extortion "in any way or degree obstruct[ed], delay[ed] or affect[ed] commerce." In light of this plain language and the doctrine of avoiding constitutionally doubtful interpretations, did the district court err in instructing the jury that no "actual effect" on commerce need be proven, and that the mere potential for an effect was sufficient?

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In light of the circuit split over whether the Commerce Clause element of the Hobbs Act, 18 U.S.C. § 1951(a), requires proof of an actual (albeit minimal) effect on interstate commerce, or only the mere potential for an effect, this Court should grant the writ to clarify the interpretation of this important federal criminal statute and to require that the statute be interpreted in accordance with its plain language	6
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Joseph Leone, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 20, 2005.

OPINION BELOW

On April 20, 2005, the Third Circuit Court of Appeals entered its precedential opinion, ruling that the district court correctly instructed the jurors regarding the Commerce Clause element of extortion under the Hobbs Act, 18 U.S.C. § 1951(a). *United States v. Urban*, 404 F.3d 754 (3d Cir. 2005). The instruction upheld by the Court of Appeals told the jurors that they did "not even have to find that there was an actual effect on commerce," and that the government need only show "that the consequences of the extortion – of the money payment, potentially caused an effect on interstate commerce to any degree, however minimal or slight." *Id.* at 762. A copy of the opinion is attached hereto as Appendix ("App.") 1.

JURISDICTION

On April 20, 2005, the Court of Appeals affirmed petitioner's conviction. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I, § 8, cl. 3 (in pertinent part):

> The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

18 U.S.C. § 1951(a) (in pertinent part):

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

Petitioner, Joseph Leone, was a municipal plumbing inspector for the City of Philadelphia, Pennsylvania. He was convicted for accepting tips, generally in the amounts of $5 to $20, from plumbers whose work he inspected. Petitioner, along with his co-defendants, Thomas Urban, Joseph J. O'Malley, Gerald S. Mulderig, Fred Tursi, James F. Smith, William C. Jackson, and Stephen M. Rachuba, was tried before a jury in the United States District Court for the Eastern District of Pennsylvania. Petitioner and his co-defendants were prosecuted under the Hobbs Act, 18 U.S.C. § 1951(a), on the theory that the acceptance of the tips constituted extortion "under color of official right." The Hobbs Act violations in turn each constituted racketeering

acts charged in a separate count under the Racketeer Influenced and Corrupt Organizations Act ("RICO").[1]

The only issue raised in this petition concerns the district court's instruction on the Commerce Clause element of the Hobbs Act, which requires that the extortionate acts obstructed, delayed or affected interstate commerce. This element is critical because the federal government's jurisdiction over these acts rests entirely on the proof of such an effect.[2]

The government's evidence in support of the Commerce Clause element consisted of the testimony of 22 plumbers who had given tips to inspectors. Most of these plumbers were operating their businesses purely within Pennsylvania, and thus they were not directly engaged in interstate commerce, but they testified that they purchased supplies from local stores, and some of these supplies were made out-of-state. Of the 22 plumbers, 16 gave uncontradicted testimony that the payment of tips did *not* affect their purchases of supplies. The remaining six simply did not address the issue. The government thus introduced no evidence that the payment of tips had any actual effect on the purchase of supplies and therefore on interstate commerce.

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[1] The indictment consisted of 67 counts. Count one consisted of the RICO charge against all the inspectors, and counts 2-67 were specific Hobbs Act charges, each alleging an instance of a plumber giving a tip to one of the inspectors.

[2] Any finding of guilt on the RICO count was dependent on a finding of guilt on two or more substantive Hobbs Act counts, making the RICO count equally vulnerable to the jurisdictional defect raised here.

The district court, over defense objection, instructed the jury that there need not be any proof of an actual effect on commerce:

> You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the extortion – of the money payment, potentially caused an effect on interstate commerce to any degree, however minimal or slight. Payment from a business engaged in interstate commerce satisfies the requirement of an effect on interstate commerce. If the resources of a business are expended or diminished as a result of the payment of money, then interstate commerce is affected by such payment and may reduce the assets available for purchase of goods, services or other things originating in other states.

Urban, 404 F.3d at 762.

After being so charged, the jury convicted petitioner and his co-defendants on the RICO count and most of the Hobbs Act counts in the indictment.[3] The district court imposed a sentence of 30 months imprisonment, as well as fines and assessments. Petitioner was released on bail pending appeal.

The Third Circuit upheld the district court's Commerce Clause instruction. As the circuit aptly noted, under the district court's instruction,

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[3] Petitioner was found not guilty on the counts relating to tips allegedly received from one of the plumbers – Richard Clements.

> the jury could convict even if it did not find that Appellants' extortionate acts actually affected commerce, so long as it concluded that the "natural consequences" of the extortionate acts "potentially caused" just a "minimal" effect on interstate commerce.

404 F.3d at 762. The court further held the jury was correctly instructed that the "potentially caused" test was satisfied upon proof of "depletion of assets" – that the inspectors "took payments from plumbers who were engaged in interstate commerce, i.e., who purchased supplies made out-of-state." *Id.* at 767. Although noting a clear circuit split on the issue, *id.* at 765 n.3, the circuit court concluded that its own circuit precedent supported the "potential effect" instruction. *Id.* at 762.

The court acknowledged it was "conceivable that, as many of the plumbers testified, the payments the plumbers made did not *actually* result in a reduction in their engagement in interstate commerce – for example, the plumbers may have absorbed the cost of those payments by cutting their profits or by reducing their labor force." *Id.* at 767. But under the court's "potentially effects" test, this made no difference. The court explained:

> Indeed, had the District Court instructed the jury that, notwithstanding proof of depletion of assets of plumbers engaged in interstate commerce, it could nonetheless acquit if it credited those plumbers' conclusory testimony that their payments to Appellants did not affect their ability to purchase supplies made out-of-state, it would have misstated the law of this Circuit – extortion which depletes the assets of persons or businesses engaged in interstate commerce is, as a matter of law, a Hobbs Act violation.